Supreme Court, U.S.
FILED
011142 FEB - 5 2002
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

RICHARD V. GARDNER,
also known as Dickie Gardner,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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53pp

QUESTION PRESENTED FOR REVIEW

I. WHETHER A PRIOR CONVICTION WHICH IS AN OVERT ACT ALLEGED IN THE CONSPIRACY IN THE INSTANT CASE CAN BE USED TO INCREASE ONE'S MINIMUM/MANDATORY SENTENCE FROM 10 TO 20 YEARS?

LIST OF ALL PARTIES TO THE PROCEEDING

The following is a list of all parties to the proceeding in the United States Court of Appeals for the Sixth Circuit whose judgment is sought to be reviewed in this case:

United States of America

Richard V. Gardner, also knows as Dickie Gardner

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OPINIONS BELOW

The United States District Court for the Eastern District of Tennessee filed its Judgment on February 21, 2001 and is unpublished and has been reproduced in the Appendix at pp. 5a-18a. The Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit. The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court on November 30, 2001 and is unpublished and has been reproduced in the Appendix at pp. 1a-4a.

SUPREME COURT JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit was filed on November 30, 2001, Appendix pp. 1a-4a. This Petition for Writ of Certiorari is filed pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND/OR STATUTORY PROVISIONS CONSTRUED

21 United States Code § 841(b)(1)(A)

United States Constitution - Fifth Amendment

Criminal Actions - Provisions concerning - Due process of law and just compensation clauses. - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The Defendant was indicted for conspiracy to possess and distribute marijuana, heroin and methaqualone. On February 20, 2001, he pled guilty to that offense. (Transcript of the Proceedings - February 20, 2001, Appendix at pp. 19a-39a. He objected to the use of his prior state conviction in 1971 for possession of marijuana for sale as a predicate for increasing his minimum/mandatory sentence to 20 years. The United States Court of Appeals for the Sixth Circuit affirmed the district court's judgment on November 30, 2001 and is unpublished and reproduced in the Appendix pp. 1a-4a.

STATEMENT OF FACTS

The Defendant was convicted in 1971 for possession of marijuana for sale or delivery. He was indicted in the United States District Court for possession of marijuana, heroin and methaqualone for sale or delivery on April 14, 1998. The parties stipulated that the prior state conviction was an overt act in the conspiracy charge in the present case. (Transcript of the Proceedings - February 20, 2001, Appendix at pp. 22a.

SUMMARY OF ARGUMENT

Prior convictions for offenses which are overt acts of a charged conspiracy should not be used to enhance one's sentence pursuant to 21 U.S.C. § 841.

ARGUMENT

I. WHETHER A PRIOR CONVICTION WHICH IS AN OVERT ACT ALLEGED IN THE CONSPIRACY IN THE INSTANT CASE CAN BE USED TO INCREASE ONE'S MINIMUM/MANDATORY SENTENCE FROM 10 TO 20 YEARS?

The present law in the Sixth Circuit is clear and certain as to this issue. In United States v. Hughes, 924 F.2d 1354 (6th Cir. 1991) and United States v. Walker, 100 F.3d 1078 (6th Cir. 1998), the Sixth Circuit held that a prior conviction which is an overt act in the conspiracy can be used to enhance one's minimum/mandatory sentence. See also United States v. Blackwood, 913 F.2d 139 (4th Cir. 1990).

The Defendant submits that this Court should reverse the Sixth Circuit and hold that the use of such a prior conviction is in violation of the laws against double jeopardy as set out in the Fifth Amendment to the United States Constitution. For that reason, he asks this Court for a Writ of Certiorari.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01-5295

[Filed, November 30, 2001]

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	)
v.	)
RICHARD V. GARDNER, also known as Dickie Gardner, *Defendant-Appellant*.	)

On Appeal From
Eastern District of Tennessee
Case No. 98-00048
District Court Judge Jordan

JUDGES:
Before: GUY and BOGGS, Circuit Judges;
CARR, District Judge. *

* The Honorable James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

ORDER

Richard V. Gardner, also known as Dickie Gardner, appeals the sentence imposed following his conviction on one count of conspiracy to distribute marijuana, cocaine, and methaqualone in violation of 21 U.S.C. §§846 and 841(b)(1)(A). The parties have waived oral argument, and upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

On April 14, 1998, a grand jury indicted Gardner on one count of conspiring to distribute the above-mentioned controlled substances from approximately 1970 to 1994. The government thereafter notified Gardner that the enhanced penalty provisions of 21 U.S.C. §841(b)(1) applied to the indictment because he had been convicted in 1971 of felony possession of marijuana in Tennessee. On October 31, 2000, Gardner pleaded guilty pursuant to a written plea agreement and stipulated that he was responsible for conspiring to distribute the equivalent of at least 3,000, but less than 10,000 kilograms of marijuana. In the presentence investigation report (PSR), the probation officer calculated Gardner's total offense level as 37, his criminal history category as I, the resulting sentencing guideline range as 210 to 262 months of incarceration, and the statutory sentencing range as twenty years to life. Gardner objected to the PSR, arguing that his 1971 conviction should not have been used to enhance his mandatory minimum sentence because the underlying offense was part of the conspiracy. The district court overruled his objection, but granted the government's motion for a downward departure based on Gardner's substantial assistance, and sentenced Gardner below the statutory minimum to 168 months in prison.

On appeal, Gardner argues that subjecting him to the mandatory minimum sentence set forth in 21 U.S.C. §841(b)(1)(A) due to his 1971 state conviction violates the Fifth Amendment prohibition against double jeopardy because the state conviction was an overt act of the conspiracy alleged in the federal indictment.

The constitutionality of a sentence is subject to de novo review. *Costo v. United States*, 904 F.2d 344, 346 (6th Cir. 1990).

The district court properly rejected Gardner's challenge to his sentence. Although the Double Jeopardy Clause protects against successive prosecution and multiple punishment for the same offense, *Witte v. United States*, 515 U.S. 389, 391, 132 L. Ed. 2d 351, 115 S. Ct. 2199 (1995), Gardner has not been subjected to either. "[A] substantive crime and a conspiracy to commit that crime are not the 'same offence' for double jeopardy purposes," because the essence of a conspiracy offense "is in the agreement or confederation to commit a crime." *United States v. Felix*, 503 U.S. 378, 389-90, 118 L. Ed. 2d 25, 112 S. Ct. 1377 (1992). Thus, Gardner's 1971 conviction for felony possession of marijuana did not preclude his subsequent federal prosecution for conspiracy to distribute.

Enhancing Gardner's sentence for conspiracy because of the 1971 conviction likewise does not violate the Double Jeopardy Clause even though one of the overt acts for supporting the conspiracy resulted in the prior conviction. "Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes which are common place in

state criminal laws, do not change the penalty imposed for the earlier conviction," *Nichols v. United States*, 511 U.S. 738, 747, 128 L. Ed. 2d 745, 114 S. Ct. 1921 (1994), and the Supreme Court has repeatedly held that such statutes do not violate the Double Jeopardy Clause. *Witte*, 515 U.S. at 400.

Finally, we note that Gardner's prior conviction is an adequate basis for enhancement under §841(b)(1)(A). "[Section] 841(b)'s increased punishments are triggered by predicate criminal episodes that occur at distinct times." *United States v. Hughes*, 924 F.2d 1354, 1361 (6th Cir. 1991). The criminal events that form the bases for Gardner's 1971 conviction and his instant conviction for conspiracy do not represent a single criminal episode, but are separate episodes which occurred at distinct times spanning a twenty-four year period. His continued involvement in a drug conspiracy after his prior conviction is the specific type of repeated criminal behavior which Congress targeted for harsher penalties in §841(b)(1)(A). *See id.* at 1362.

Accordingly, the district court's judgment is affirmed.

ENTERED BY ORDER OF THE COURT

/s/_____

Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
Eastern District of Tennessee

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 3:98-CR-48-01

[Filed, February 21, 2001]

UNITED STATES OF AMERICA)
)
V.)
)
RICHARD VAN GARDNER)
)

Douglas A. Trant
Defendant's Attorney

THE DEFENDANT:

[x] pleaded guilty to count(s): 1 of the Indictment.
[ ] pleaded nolo contendere to counts(s) __ which was accepted by the court.
[ ] was found guilty on count(s) ___ after a plea of not guilty.
Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. §§846 and 841(b)(1)(A)	Conspiracy to Distribute Marijuana, Cocaine and Methaqualone	May 31, 1994	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on counts(s) __ and is discharged as to such count(s).

[ ] Count(s) __ is/are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 415-78-0991
Defendant's Date of Birth: 11/13/1948
Defendant's USM No.: 10551-035

Defendant's Residence Address:
828 Eagle Pointe Drive
Rockwood, TN 37854

Defendant's Mailing Address:
828 Eagle Pointe Drive

Rockwood, TN 37854

February 20, 2001
Date of Imposition of Judgment

/s/_____

Signature of Judicial Officer

Leon Jordan, United States District Judge
Name & Title of Judicial Officer

02-21-01
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 168 months.

[X] The court makes the following recommendations to the Bureau of Prisons:
That the defendant be placed in the FCI at Manchester, Kentucky, and participate in the Comprehensive Drug Treatment Program.

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.
[ ] at ___ on ___
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
[ ] before ___ on ___.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

Defendant delivered on ___ to ____ at ___, with a

certified copy of this judgment.

_____
UNITED STATES MARSHAL

By_____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

[X] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check if applicable).

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant

pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons

engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While on supervised release, the defendant shall not commit another federal, state, or local crime, shall comply with the standard conditions that have been adopted by this Court in Local Rule 83.10, and shall not illegally possess a controlled substance.

In addition, he shall comply with the following special conditions:

1. He shall refrain from possessing a firearm, destructive

device or other dangerous weapon.

2. He shall participate in a program of testing and treatment for drug and/or alcohol abuse, as directed by the probation officer until such time as he is released from the program by the probation officer.

Title 18 U.S.C. Sections 3565(b) and 3583(g) require mandatory revocation of supervised release for possession of a controlled substance or a firearm, or for failure to comply with drug testing.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 50.00	$	$

[ ] If applicable, restitution amount ordered pursuant to plea agreement .....$___

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _.

The defendant shall pay interest on any fine of more than $2500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5, Part B may

be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred in a case brought under Chapters 109A, 100, 110A and 113A of Title 18 for offenses committed on or after 09/1 3/1994, until up to 60 days. An amended Judgment in a Criminal Case will be entered after such determination.

[ ] The court modifies or waives interest on restitution as follows:

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order of percentage payment column below.

Name of Payee	**Total Amount of Loss Ordered	Amount of Restitution	Priority Order or % of Pymnt
	TOTALS:	$	$

* * Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13. 1994.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [X] in full immediately; or

B [ ] $ _ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than_; or

D [ ] in installments to commence_ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _ (e.g. equal, weekly, monthly, quarterly) installments of $ _ over a period of_ year(s) to commence_day(s) after the date of this judgment.

Special instructions regarding the payment of criminal monetary penalties:

[ ] Joint and Several

Case Number (Including defendant number)	Defendant Name	Joint and Several Amount

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary payments are to be made as directed by the court, the probation officer, or the United States Attorney.

STATEMENT OF REASONS

[X] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: :37

Criminal History Category: I

Imprisonment Range: 240 to 262 months

Supervised Release Range: 10 years to Life

Fine Range: $ 20,000.00 to $ 8,000,000.00

[X] Fine is waived or is below the guideline range, because of inability to pay.

Total Amount of Restitution: $

[ ] Full restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s).

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons(s):

OR

[X] The sentence departs from the guideline range:

[X] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following specific reason(s):

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE, TENNESSEE

NO. 3:98-CR-48

SENTENCING

UNITED STATES OF AMERICA,
PLAINTIFF,

VS.

RICHARD V. GARDNER,
DEFENDANT.

TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE LEON JORDAN, U. S. DISTRICT JUDGE, ON FEBRUARY 20TH, 2001.

APPEARANCES:

ON BEHALF OF THE PLAINTIFF:

MICHAEL E. WINCK, ESQ.
HUGH B. WARD, JR., ESQ.
U.S. ATTORNEY'S OFFICE
KNOXVILLE, TENNESSEE

ON BEHALF OF THE DEFENDANT:

DOUGLAS A. TRANT, ESQ.
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(Whereupon, Tuesday, February 20th, 2001, Court Convened in the Following Matter at 1:25 P.M.)

Deputy Clerk: Criminal Action 3-98-48, United States of America vs. Richard V. Gardner. Is the Government present and ready?

Mr. Winck: The Government's present and ready, Your Honor.

Deputy Clerk: Is the Defendant present and ready?

Mr. Trant: We're present and ready, Your Honor.

The Court: Good Afternoon, Gentlemen.

Mr. Winck: Good Afternoon, Your Honor.

Mr. Trant: Good Afternoon.

The Court: We're here for the sentencing of Richard Van Gardner. The Government had an opportunity to consider the presentence report?

Mr. Winck: We have, Your Honor. We have no objections to it.

The Court: Mr. Trant, have you and Mr. Gardner gone over the presentence report?

Mr. Trant: We have, Your Honor, and the only objection we have is the use of the prior conviction in 1971 to enhance the minimum mandatory to 20 years under the

statute. As I wrote in my pleadings, we know what the Sixth Circuit law is. I merely want to have the opportunity to take that up to the Supreme Court, so if the Court would make a finding that it has to, I think under prevailing law that would be satisfactory with us.

The Court: All right. Well - Go ahead Mr.-

Mr. Winck: And, Your Honor, If I may- Mr. Trant and I have talked about this - it may not be clear from the pleadings and may be irrelevant, since Mr. Trant's not pursuing the second objection. But as to the second objection, the plane, or the planes that were used in this conspiracy, would have been private planes as opposed to commercial aircraft.

The Court: Do you stipulate that, Mr.-

Mr. Trant: Yes, Your Honor. And I should say, in addition that both parties, as to the objection that we're maintaining, agree that the acts for the 1971 conviction were an overt act as part of this conspiracy. There's no dispute about that.

The Court: Very well.

Mr. Winck: We would agree with that.

The Court: All right. The Sixth Circuit has held that it is appropriate for a Defendant's subsequent drug conspiracy conviction to be enhanced by a prior substantive drug conviction which was an overt act in furtherance of the conspiracy, and it's been held so in United States vs. Hughes,

924 Fed. 2d 1354, and in the case of United States vs. Blackwood, 913 Fed. 2d 139, which is the Fourth Circuit case. United States vs. Hughes is the Sixth Circuit case. The Court is going to respectfully overrule the objection. You may appeal.

Any other matters we need to address at this time as to the Presentence Report?

Mr. Winck: No, not by the United States, Your Honor.

The Court: All right. The Court has received the Government's Motion for a Downward Departure filed under seal pursuant to - the Departure is filed pursuant to 18 U.S.C. Section 3553(e) and United States Sentencing Guideline Section 5K1.1, and the Court has read the documents furnished in support of that motion. Do you want to address that any further, Mr. Winck?

Mr. Winck: No, Your Honor. First of all, I want to thank the Court for accommodating both the Defendant and us in allowing us to pursue that aspect of the Plea Agreement, and I appreciate that. I know that causes your docket to get stacked up, but we do appreciate it.

I tried to lay out all of the factors that we considered in making that Motion, and as set forth in the Motion, we are recommending the Departure down to 14 Years. Unless the Court has questions, I'll rest on what we've said there.

The Court: You did send Mr. Trant a copy and the court reporter a copy --not the court reporter. I'm sorry.

She's shaking her head.

Mr. Winck: Probation Department?

The Court: Probation Department.

Mr. Winck: Yes, Sir.

The Court: Yes. Okay. Now, Mr. Trant, I have read the communications that are attached to and made an exhibit to the Motion for a Downward Departure. Do you have anything to add to the communications?

Mr. Trant: I don't, Your Honor, other than, as you can see, there has been considerable effort on the defense side for Mr. Gardner to provide substantial assistance, and some of those efforts certainly have been very successful, and we hope that there will be more success certainly in the future that would entitle us to come back before you.

But we certainly agree with the Government's Motion for a Downward Departure, and whenever you're ready, I'll address my motion.

The Court: Go ahead.

Mr. Trant: Your Honor, in addition to the grounds set forth by the Government, we would ask the Court to grant a further Downward Departure essentially for the next three reasons. First, even though there is a minimum mandatory sentence in this case of 20 years, the Court will note that the Guidelines start at 17 and a half years. We would ask the Court to take that into consideration when deciding how far

to depart.

In addition to that, Your Honor, you've read our pleadings about the treatment that Mr. Gardner and his brother, now deceased, Carey, received while in prison in Costa Rica. If Mr. Fels and I hadn't seen it with our own eyes, we probably would not have believed it, how bad it was.

Despite the treaties that we have with Costa Rica and despite the U. N. Proclamations, Resolutions, Mr. Gardner and his brother, Carey, as pretrial detainees, were kept in the worst possible prison in the country, in a place called the "Tombs." And they call it that for a reason, because it's apparently patterned after a 15th Century Inquisition torture chamber.

People are made to sleep on replica concrete slab tombs. They have to dig their own latrines, clean them out, they don't have fresh water. They don't have anything other than beans and rice to eat, no exercise is provided. They were not provided medical care, even though Richard Gardner is a diabetic. He didn't get his medicine. He had a severe reaction, which endangered his health substantially.

They were attacked by convicted bank robbers as soon as they were put in this unit. It was as unclean as unclean can be. I can't describe how bad it was, with rats all over the place, flies all over us when were in there. It's just - it's totally unbelievable.

And there were better facilities in the country under which they could have been kept, but they weren't. They

were kept there until they were transferred back to another prison and put in a unit where Mr. Richard Gardner told the authorities these Guatemalan bank robbers who are in there attacked us before, don't put us in there. Well, they put them in there, and within five minutes Carey Gardner was stabbed in the heart and died in his brother's arms.

Richard Gardner has nightmares about that every night and probably always will. I mean, it's a horrible, horrible thing to happen, and it was an ambush, and there is no question about it, no question that somebody in the Costa Rican authorities knew they were doing it.

Mr. Fels and I, when we were there, went to our Embassy, met with our Consul and pleaded with them, please do something to take these guys out of this dangerous condition, and the United States Embassy, as far as we could tell, never did anything.

Mr. Winck makes the point in his pleadings, Your Honor, that, well, if they'd waived extradition they wouldn't have been there. There are good reasons for contesting extradition that I didn't know about until I had this case.

Neither Mr. Fels nor - Neither I knew about it, and that is, unlike removal hearings we have in the U. S., extradition hearings can be extremely important for Defendants, because countries can put conditions on the extradition. In fact, in the Trial Court in this case, in Puntarenas, Costa Rica, imposed the conditions for extradition that the maximum sentence be 20 years, if they were to be extradited to the U. S.; and, further, that the only acts under which they could be prosecuted would be the acts

from 1986 to 1994, not all the way back to 1971.

They were arrested March 12, 1999, and that Trial Court decision came out August 23rd of that year. Now, after that decision they couldn't have left if they'd wanted to, because the Government appealed the decision of that Trial Court. It appealed it on to what would be equal to our Court of Appeals and then the case went on to the Constitutional Court, which is basically our Supreme Court.

The Supreme Court or the Constitutional Court of Costa Rica informed the United States Government on The 21st of January of 2000 that they could have Mr. Richard Gardner and Tammy Knox (Phonetic). It's significant to note that after the August, 2000, decision of the Trial Court, it was November third that Carey Gardner was killed. So that occurred after the decision of the Trial Court and while that decision was pending in the Appellate Court.

And even though the Costa Rican authorities said you can have them on January 21st, it wasn't until March 17th of 2000 that they were actually transported to the U. S. so for the bulk of the time that they were there they couldn't have left if they wanted to, because a decision was appealed, and then they were awaiting transportation, and still the conditions were bad and still they got worse.

After Mr. Carey Gardner was murdered, Mr. Richard Gardner was left in the same prison, barely ever slept, because he was on guard to try to keep the same thing from happening to him. You can imagine, and he knew, in fact, when Carey was killed, Mr. Richard Gardner called me and asked me to call his Dad, because his Dad has a bad heart,

and he was afraid that if he heard it from somebody else he might have a heart attack.

And I had to confirm with Mr. Carl Gardner that, in fact, his son, Carey, was killed. And Richard Gardner, not for just his own sake, but for his Dad and Mom's sake, was determined not to let the same thing happen to him if he could prevent it, and that's why he never, never, slept.

Your Honor, that kind of incarceration, I would submit, deserves your consideration for an additional Downward Departure in and of itself because of how tortuous, how cruel, how inhuman, how criminal it was. The year that Mr. Gardner spent down there should count for more, I would submit to Your Honor, than a year that we would normally count for incarceration in the United States, and I would ask Your Honor to carefully consider that.

The last ground that I would ask Your Honor to consider is the remoteness of the 1971 prior conviction. The case that I cited in my Motion, U. S. v. Fletcher, 15 F3d 553, is a 1994 Sixth Circuit opinion, and Judges Boggs and Siler were on the panel, and they're not flaming liberals, as this Court knows. But they said the District Court can consider the remoteness of a prior conviction.

In that case, what we had was somebody who in 1991 was arrested for bank robbery and then who, in 1976, had a conviction for aggravated assault and in 1985 a conviction for felonious assault. So he qualified as a career offender. And the Judges held that because particularly the 1976 conviction was so remote that the Trial Judge had the authority to grant a Downward Departure under 18 U.S.C. 3553(b).

Mr. Fletcher had nine criminal history points. In this case, Your Honor, Mr. Gardner has zero criminal history points. He was arrested in 1999. It's significant to note that the last alleged criminal activity by him was in 1994, five years before his arrest, which certainly could be considered as to his likelihood of being recidivist, and the prior offense which enhances this conviction is 1971.

In addition to that, Your Honor, he was on his good behavior while he was in Costa Rica, and we have attached a Certificate of Good Reputation from the - What would be equal to our Sheriff down there. For this reason as well we would submit, Your Honor, that a further Downward Departure is certainly merited.

If Your Honor would consider all of these together, I would submit that more than a 30 percent reduction, total reduction, is warranted, which is what the Government has asked for. I would ask the Court to consider a 50 percent reduction to 10 Years. That's still a long sentence.

Mr. Gardner is 52. It would take him eight and a half years to serve that, even if he gets all of his good time; seven and a half if he is able to participate in the comprehensive drug treatment program. It certainly would not diminish the seriousness of the offense, but I think would be appropriate under all these circumstances, and I appreciate the Court's consideration of all these factors.

The Court: Thank You, Sir. Mr. Winck?

Mr. Winck: Your Honor, it is true that in Costa Rica, when Mr. Gardner and his Codefendants down there pursued

a challenge to the extradition process at the Lower Court Level, they prevailed on some issues, and had that carried the day, that would have limited somewhat our case here in the United States.

In fact, the Government in Costa Rica appealed that, but - and I can stand corrected, if I'm wrong, but I believe the Defendants also appealed the ruling that they got, because they were seeking additional relief. So it wasn't just the Government that appealed the Lower Court Ruling, but both parties.

The Defendant asks that the Court consider the age of his prior felony drug conviction in Tennessee in taking into consideration what his sentence should be here today, and granted that conviction is old. But as we pointed out in our response, the Defendant was charged with trafficking in 1,020 pounds of marijuana in Kentucky, and under the law at that time, since he had already received a prior felony drug conviction in Tennessee, that should have been a felony there.

They pled it to a misdemeanor. Had he been convicted of that felony, he would have been facing a mandatory term of life imprisonment here today. So when you're weighing the oldness of that one conviction, I think you can look at this other conviction which, the handling of it, has certainly saved him exposure to a term of life imprisonment here, and that's a fact which the Court should take into consideration.

Likewise, I would suggest this. This is a case which, as the Court can see from the Indictment, charges a conspiracy from 1971 to 1994. Mr. Gardner, in his participation in this conspiracy with others, pursued pretty

much of his adult life a business of trafficking in drugs that was huge. It was extremely large, one of the largest that we've prosecuted within the Eastern District of Tennessee.

And the fact that he has that one old drug conviction doesn't mean that throughout the entire time period he was not operating. Obviously he was. He's plead guilty to this conspiracy. And so the fact that it's old, I would suggest, does not mitigate against a shorter departure as opposed to a long one.

In fact, he's had, as reflected in his presentence investigation report, which shows that that was not the only brush with the law, a number of opportunities to cease this kind of conduct and didn't. It took us a long time to acquire sufficient evidence to charge him and prosecute him and ultimately convict him, but it has ultimately finally been a success.

So I just say that in response to the argument that the drug conviction is old. Mr. Trant has recommended to the Court that instead of the six-year reduction that the Government has asked for or recommended that 10 years would be more appropriate, and I would disagree with that for the following reasons.

Number One, when we have had people come before this Court who have produced results, much more extensive than this, where we've recommended 50 percent - We're trying to be consistent in our recommendations to the Court. That's Number One. Number Two, Mr. Trant's indicated, and I think appropriate, I think the Court should recommend drug treatment for Mr. Gardner. He's had a drug addiction

problem for some time. If he gets that in the Bureau of Prisons, he should receive an additional year cut off his time, if he receives it.

Thirdly, Your Honor, again, when you- we have laid out the nature and extent of the cooperation in our sealed pleading. I would submit to the Court that the recommendation we've made is quite generous. In fact, I've solicited the input from other people that were participants in this investigation and had to have it approved in our office. Mine was the lowest number of 14 years. Most others would not have gone that low, but that's our recommendation, of 14 years.

When you compare the people listed in the sealed Motion to Mr. Gardner and their activities compared to him, there's quite a bit of difference. I don't mean to suggest that we are not grateful. We are grateful for the nature and extent of the cooperation, and that's why we filed the Motion. But, again, simply trying to put this case in perspective with other cases you've had, I believe that a 14-year recommendation is a fair one and would ask the Court to impose a sentence in that amount.

If the Court has any other questions, I'd be glad to try to answer that. Thank You.

The Court: Thank You.

Mr. Trant: May I respond just very briefly, Your Honor?

The Court: Yes, Sir.

Mr. Trant: Your Honor, of course, the reason we're asking for the Court to go down below 14 is not just the substantial assistance. It's for the other reasons that we've laid out, the Costa Rican cruel and inhuman treatment, as well as the remoteness of the prior conviction.

And I think it is important to note that there is no allegation nor any proof that Mr. Gardner engaged in any drug trafficking past 1994, and between 1994 and 1999 is five years. That's a long time, and I think that's significant in the Court's consideration of the appropriateness of the sentence and the likelihood of recidivism, and I certainly would ask the Court to carefully consider that. Thank You.

The Court: Thank You. Of course, the Court has read the file and has had an opportunity to consider the Defendant's Motion. The Defendant's looking at a minimum mandatory 20-year sentence. As pointed out by the Government, he could be looking at a life sentence.

The Kentucky arrest and conviction was for a misdemeanor, the plea was to a misdemeanor. The Indictment states as to Count One the Defendant did have in his possession a quantity of marijuana 1,021 pounds; Count Two, the Defendant did carry a concealed weapon; and Count Three was a sentencing enhancement as to the Defendant's prior conviction.

So if it had been in this United States District Court or in the Kentucky United States District Court, the Defendant would have been looking at a minimum what, 10 years, Five and Five?

Mr. Trant: Of course, Your Honor, we don't know what the proof was.

The Court: Well, I don't, either.

Mr. Trant: The proof only supported a Misdemeanor. I think that's what we have to look at, not what the charges were.

The Court: Weli, he was extremely fortunate under those circumstances. So the Indictment again covers a period from 1971 through 1994. It's the Court's understanding that the Defendant has been in Costa Rica since then?

Mr. Trant: That's not correct.

The Court: How long has he been there?

Mr. Trant: He went to Costa Rica in 1997.

The Court: Why did he go to Costa Rica?

Mr. Trant: Your Honor, if the case had gone to trial, we would have been prepared to show why he went to Costa Rica. There were reasons, a lot of reasons, other than this case, compelling reasons, regarding his own safety and one of the Codefendant's in this case - Not one of the Codefendants, but one of the Coconspirators.

The Court: It's the Court's understanding - You correct me if I'm wrong - but the Government had been investigating the Defendant's activities for more than 10 years.

Mr. Trant: That's my understanding, Yes, Sir.

The Court: All right. So the Court recognizes that this Defendant is probably the most successful drug dealer in the Eastern District of Tennessee since 1970. Certainly he's moved more drugs than any Defendant this Court has ever seen before into the Eastern District of Tennessee.

As to the issue of the treatment in the prison in Costa Rica, the first thing, of course, is the fact that the Defendant did fight extradition. Mrs. Melton has checked with the Bureau of Prisons and gone to their highest authority that we can communicate with and has ascertained that he will get the benefit of time served in Costa Rica on his sentence here. So the Court does not consider that an adequate ground for a Downward Departure.

As far as the remoteness of the 1971 prior conviction, you can address that with the Supreme Court. So the Court's going to respectfully decline to rule favorably on your Motion for a Downward Departure.

All Right. Anything Further, Mr. Winck?

Mr. Winck: Not at this time, Your Honor.

The Court: Mr. Trant?

Mr. Trant: No, Sir.

The Court: All right. Bring the Defendant to the lectern. Good Afternoon, Mr. Gardner. This is your opportunity to speak to the Court in mitigation of your

sentence. Do you have anything you wish to tell the Court before the Court imposes sentence?

Mr. Gardner: No, Sir, I don't.

The Court: Very well. The Court will grant the Government's Motion for a Downward Departure. Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the Defendant, Richard Van Gardner, is hereby committed to the custody of the Bureau of Prisons for a term of imprisonment of 168 Months. This term is lower than the Guideline Range of 240 to 262 Months and is authorized due to the Government's Motion for a Downward Departure pursuant to 18 U.S.C. Section 3553(e) and United States Sentencing Guideline Section 5K1.1. It is felt that this sentence of 168 months will afford adequate deterrence and will provide just punishment.

Upon release from imprisonment, you shall be placed on supervised release for a term of five years. Within 72 hours of your release from the custody of the Bureau of Prisons, you shall report in person to the Probation Office in the district to which you are released.

While on supervised release, you shall not commit another Federal, State or Local crime, and you shall comply with the standard conditions that have been adopted by this Court in Local Rule 83.10, and you shall not illegally possess a controlled substance.

In addition, you shall comply with the following special conditions: you shall refrain from possessing a firearm or a destructive device or other dangerous weapon. You shall

participate in a program of testing and treatment for drug and/or alcohol abuse as directed by your Probation Officer until such time as you are released from the Program by the Probation Officer. I advise you that Title 18 U.S.C. Section 3565(b) and 3583(g) require mandatory revocation of supervised release for possession of a controlled substance or of a firearm or for failure to comply with drug testing. Pursuant to 18 U.S.C. Section 3013, you shall pay a special assessment fee of $50, which is due and payable immediately.

Mr. Trant: That's been done, Your Honor.

The Court: Thank You. The Court finds that you do not have the ability to pay a Guideline Range fine and the fine will be waived in this case. The Plea Agreement in the case is accepted. All right. Pursuant to Rule 32(c)(5) of the Federal Rules of Criminal Procedure, the Court advises you that you may have the right to appeal the sentence imposed in this case. A Notice of Appeal must be filed within 10 days of entry of the Judgment. If you request and so desire, the Clerk of the Court can prepare and file the Notice of Appeal for You.

The Court will recommend to the Bureau of Prisons that you be considered for their drug treatment program. Have you talked with him as to a possible recommendation to the Bureau of Prisons for a facility?

Mr. Trant: Yes, Your Honor. We would ask the Court if the Court would consider recommending the Federal Correctional Institute at Manchester, Kentucky.

Ms. Melton (Probation Officer): They don't have a

comprehensive drug treatment program.

Mr. Trant: Well, they'd have to transfer him when he gets eligible, but it will be a while before he is eligible for it.

Ms. Melton: Well, He Had A-

Mr. Trant: He Does -

Ms. Melton: And he may not get transferred. It's usually better to go to the institution where they have it, but, I Mean -

Mr. Trant: We understand that, Your Honor.

The Court: Of course, Manchester is the closest.

Mr. Trant: Yes. Yes, Sir.

The Court: And that's where you want to go?

Mr. Gardner: Yes.

The Court: All Right. The Court will recommend to the Bureau of Prisons that you be considered for placement at the Manchester, Kentucky Facility. It's further ordered that you be remanded to the custody of the Attorney General pending designation by the Bureau of Prisons. Do you have any questions?

Mr. Gardner: No, Sir.

The Court: Mr. Trant?

Mr Trant: No, Your Honor.

The Court: Mr. Winck?

Mr. Winck: No, Your Honor, I do not.

The Court: All right. Do you want this Motion for a Downward Departure continued to be filed under seal?

Mr. Winck: Yes, Sir.

The Court: Very well. So ordered. If nothing further, Court will stand adjourned.

(Hearing Concluded at 1:54 P.M.)

CERTIFICATION

I certify that the foregoing is an accurate transcript of the record of proceedings in the titled matter.

/s/_____ 3/8/01

Donetta Kocuba
Official Court Reporter
U.S. District Court
Knoxville, Tennessee

DATE